Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term 1996

DR. MARVIN DUNN,

Petitioner,

vs.

MIAMI HERALD PUBLISHING CO., a division of Knight-Ridder, Inc., a Florida corporation; and TOM DUBOCQ,

Respondents.

Petition For Writ Of Certiorari To The Third District Court Of Appeal Of Florida

PETITION FOR WRIT OF CERTIORARI

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Submitted Pro Se

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40PP

QUESTIONS PRESENTED

1. Whether the lower court, in upholding a trial court's grant of summary judgment in favor of defendants in a defamation suit, erred in relying on its opinion in *Stembridge v. Mintz*, 652 So.2d 444 (Fla.App. 3 Dist. 1995), which creates a wholesale exemption from defamation liability for statements of "opinion," in light of this Court's holding in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 110 S. Ct. 2695 (1990), which held that the First Amendment to the United States Constitution does not require a wholesale exemption from defamation liability for anything which might be labeled "opinion" given the already numerous existing protections afforded defendants in a defamation action.

2. Whether the statements at issue are capable of being proven false and thus actionable under this Court's holding in *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 106 S.Ct. 1558 (1986), which held that statements of opinion relating to matters of public concern which do not contain a provably false factual connotation are not actionable under state defamation laws.

LIST OF PARTIES

The parties to the proceedings are:

Petitioner:

Dr. Marvin Dunn

Respondents:

Miami Herald Publishing Co., a division of Knight-Ridder, Inc., a Florida corporation; and Tom Dubocq

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Table of Contents	iii
Table of Citations	v
Opinions Below	1
Jurisdiction	1
Constitutional Provision at Issue	1
Statement of the Case	2
Procedural Background	3
Reasons for Granting The Writ	6
I. THE LOWER COURT ERRED IN HOLDING THAT THERE EXISTS A WHOLESALE EXEMPTION FROM DEFAMATION LIABILITY FOR ANYTHING WHICH MIGHT BE LABELED "OPINION"	6
II. THE STATEMENTS PRINTED BY RESPONDENTS ARE ASSERTIONS OF OBJECTIVE FACT WHICH ARE CAPABLE OF BEING PROVEN FALSE, AND THUS ACTIONABLE UNDER THIS COURT'S HOLDING IN *PHILADELPHIA NEWSPAPERS, INC. v. HEPPS*	11
Conclusion	19
The decision of the Third District Court of Appeal of Florida	App. 1

TABLE OF CONTENTS – Continued

Page

The decision of the Honorable Murray Goldman of the Circuit Court for the 11th Judicial Circuit in and of Dade County, Florida.....App. 3

The decision of the Honorable Stuart M. Simons of the Circuit Court for the 11th Judicial Circuit in and of Dade County, Florida .....App. 8

Article: The Miami Herald, July 10, 1993.....App. 10

Editorial: The Miami Herald, July 17, 1993.....App. 14

TABLE OF CITATIONS

Page

CASES CITED:

Eastern Air Lines, Inc. v. Gellert, 428 So.2d 923 (Fla. 3d DCA 1983) 8, 9, 10

From v. Tallahassee Democrat, Inc., 400 So.2d 52 (Fla. 1st DCA 1981) 8

Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997 (1974) 6, 7, 9

Harte-Hanks Commissions, Inc. v. Connaughton, 491 U.S. 657, 109 S.Ct. 2678 (1989) 18

New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710 (1964) 16

Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 106 S.Ct. 1558 (1986) 11, 12

Milkovich v. Lorain Journal Co., 497 U.S. 1, 110 S.Ct. 2695 (1990) ..... *passim*

Stembridge v. Mintz, 652 So.2d 444 (Fla.App. 3 Dist. 1995) 5, 6, 7, 10, 11, 19

Zambrano v. Devanesan, 484 So.2d 603 (Fla.App. 4 Dist 1986) 8, 10

U.S. CONSTITUTION:

U.S. Const. Amend. I 1, 5, 8, 9, 10, 19

STATUTES CITED:

28 U.S.C. § 1257 1

OTHER AUTHORITIES:

Restatement (Second) of Torts, section 566 ..... 8, 11

Florida Supreme Court Manual of Internal Operating Procedures, section II.A.1.(a) 1

OPINIONS BELOW

The decision of the first trial judge denying Respondents' motion for summary judgment is not reported. It is reprinted in the appendix, App. 8. The decision of the second trial judge granting Respondents' motion for summary judgment after reconsideration is not reported. It is reprinted in the appendix, App. 3. The per curium decision of the Third District Court of Appeal of Florida affirming the grant of summary judgment is reprinted in the appendix, App. 1.

JURISDICTION

The district court of appeal handed down its per curium order affirming the grant of summary judgment in favor of Respondents on March 26, 1997. Appeal to the Supreme Court of Florida is precluded by section II.A.1.(a) of the Florida Supreme Court Manual of Internal Operating Procedures, which states that cases disposed of by the district courts of appeal without a written opinion are not reviewable. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION AT ISSUE

United States Constitution Amendment 1:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to

peaceably assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

Petitioner Dr. Marvin Dunn was a highly respected leader in the African American community in South Florida. He was founder and principal of the Academy for Community Education ("Academy"), a community based alternative school for troubled children. The Academy was part of the Institute for Innovative Interventions, Inc. ("III"), an umbrella organization for which Dr. Dunn served as executive director. He held that position until July, 1993. Dr. Dunn is also an associate professor of psychology at Florida International University in Miami. Dr. Dunn concedes that he is a public figure for the purposes of this defamation action.

In early 1993, a disgruntled employee, Marjorie Rankin, began making complaints to the Board of Directors of III ("directors") and the State Attorney's Office regarding Dr. Dunn's operation of the Academy. As a result, the directors hired Julio Buzzi's accounting firm to perform an audit for the 1992 school year for the Academy.

Relations between Dr. Dunn and certain directors began to deteriorate and continued to deteriorate when Dr. Dunn began efforts to start a new entity, the Institute for Innovative Interventions, Inc. 2 ("III 2"), and made efforts to have the Academy moved from III to III 2. As a result, Dr. Dunn's resignation was sought by the directors and, ultimately, he was terminated for that reason.

Respondents took an interest in the activities of the Academy because one of their columnists, Liz Balmaseda, was related to a III director. On July 10, 1993, Respondents published an article, which is a subject of this lawsuit, that stated "directors of the Academy for Community Education voted late Thursday to seek Dr. Dunn's resignation after an auditor told them the school's financial books are a shambles." Thereafter, on July 17, 1993, Respondents published what purported to be an editorial, which is also a subject of this lawsuit, which stated, "Marvin Dunn, a private school administrator who put public funds to personal use, paid the price with his job."

PROCEDURAL BACKGROUND

On January 19, 1994, Petitioner filed his Complaint containing two counts for libel against Respondents. Count I claimed libel with respect to the July 10 newspaper article published by Respondents, and Count II claimed libel with respect to the July 17 editorial published by Respondents. The trial judge initially assigned to the case was the Honorable Stuart M. Simons. Respondents moved to dismiss the Complaint and the trial judge denied that motion. Thereafter, discovery proceeded.

After 16 months of discovery, in May of 1995, Respondents moved for summary judgment on substantially the same grounds as their previous motion to dismiss, but added the argument that the statements at issue were "protected opinion/fair comment." Petitioner opposed the motion arguing that the record reflected

genuine issues of material fact as to whether: (1) the July 10 statement and the July 17 statement were false; (2) Respondents knew the statements were false, or should have known they were false at the time they were published; and (3) the statements were protected opinion/ fair comment. Judge Simons, who by that time had presided over the case for more than 18 months, and who during that time had, *inter alia*, considered several motions and memoranda, heard numerous arguments, including lengthy oral argument on the motion for summary judgment, considered numerous affidavits and depositions, etc., denied Respondents' Motion for Summary Judgment. In his denial, Judge Simons specifically found that there were "genuine issues of fact existing as to all of the issues, including reckless disregard for falsity."

More than twenty (20) days later, on September 20, 1995, Respondents moved for reconsideration of the denial of summary judgment. Petitioner opposed reconsideration and, at the hearing on the motion for reconsideration, argued, *inter alia*, that it was untimely. On January 11, 1996, Judge Simons granted Respondents' Motion for Reconsideration, over petitioner's objections. Immediately thereafter, Judge Simons recused himself from the case. At the time of his recusal, Judge Simons had presided over the case for nearly two years. At no time prior to his recusing himself had any of parties, or the court, mentioned recusal.

On the same day as his recusal, Judge Simons set aside his order denying Respondents' Motion for Summary Judgment. The two-year-old case was then transferred to the Honorable Murray Goldman. Respondents

were then permitted to reargue their Motion for Summary Judgment. Judge Goldman, after presiding over the case for a little less than two (2) weeks, and considering the entire file, which by that time consisted of more than 1200 pages, found contrary to Judge Simons, and granted Respondents' motion for summary judgment. Judge Goldman then entered a Final Judgment in favor of Respondents. Petitioner moved for a rehearing but was denied. Judge Goldman based his decision in part upon his view that the statements in the articles were nonactionable opinion, and cited *Stembridge v. Mintz*, 652 So.2d 444 (Fla.App. 3 Dist. 1995), as support.

Petitioner made a timely appeal to the Third District Court of Appeal of Florida, which affirmed the grant of summary judgment in a per curium order. The court wrote no opinion and cited only its recent holding in *Stembridge*. The *Stembridge* decision was based solely on the ground that the defamatory statements in that case were nonactionable "protected opinion." Since the appellate court disposed of the case without opinion, appeal to the Supreme Court of Florida is not possible. This appeal followed. Petitioner now seeks review only as to the court of appeal ruling regarding the proper scope of the "opinion" protection afforded defendants in a defamation claim under the First Amendment.

REASONS FOR GRANTING THE WRIT

I. THE LOWER COURT ERRED IN HOLDING THAT THERE EXISTS A WHOLESALE EXEMPTION FROM DEFAMATION LIABILITY FOR ANYTHING WHICH MIGHT BE LABELED "OPINION"

In *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 110 S.Ct. 2695 (1990), this Court granted certiorari "to consider the important questions raised by the Ohio courts' recognition of a constitutionally required 'opinion' exception to the application of its defamation laws." 110 S.Ct. at 2701. *Milkovich* held that the Ohio court (as well as a number of other lower courts) developed this "opinion" exception based on a mistaken interpretation of this Court's dictum in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997 (1974). 110 S.Ct. at 2705. *Milkovich* further held that the First Amendment does not require a "wholesale defamation exemption for anything that might be labeled 'opinion'." 110 S.Ct. at 2705. "The breathing space which freedoms of expression require in order to survive is adequately secured by existing constitutional doctrine without the creation of an artificial dichotomy between 'opinion' and fact." 110 S.Ct. at 2706.

In the present case, a lower court has adopted a wholesale "opinion" exemption similar to the one reviewed and condemned by this Court in *Milkovich*. In affirming a grant of summary judgment in favor of Respondents, the court of appeal issued a per curium order which cites only *Stembridge v. Mintz*, 652 So.2d 444 (Fla.App. 3 Dist. 1995). The *Stembridge* court reversed a grant of partial summary judgment in favor of a plaintiff

in a defamation suit on the sole ground that the defamatory statements in that case were nonactionable "pure opinion." 652 So.2d at 447. However, the *Stembridge* opinion indirectly relies for its analysis on a certain passage of dictum from *Gertz*. This same *Gertz* dictum was the principle source behind the mistaken view that, in addition to all other Federal constitutional protections, there existed a separate protection for statements labeled "opinion." *Stembridge* perpetuates this mistaken interpretation, and creates a wholesale exemption from defamation liability for anything that might be labeled "opinion." *Stembridge* is clearly at odds with this Court's holding in *Milkovich*.

The facts of *Stembridge* are as follows: Stembridge brought an action against his insurance company. Mintz was counsel for the insurance company. Although the verdict in that case was in Stembridge's favor, he was unhappy with the result. Stembridge filed a form with the Florida Bar entitled "Inquiry/Complaint Form" ("Bar Inquiry"). In the Bar Inquiry Stembridge asked whether certain arguments made by Mintz in the previous Insurance Action gave rise to any problems as they relate to the rules regulating the Florida Bar. The Florida Bar responded that the complaint did not evidence that the accused attorney had acted unethically or in violation of the rules regulating the Florida Bar. Mintz then sued Stembridge for defamation based on the Bar Inquiry. Stembridge had sent copies of the Bar Inquiry to several third parties. Mintz alleged that he was defamed by the copies which were sent to these third parties.

The trial court granted partial summary judgment in favor of Mintz, and the court of appeal reversed. In reaching this decision, the *Stembridge* court stated that

"the determination whether a statement is fact or opinion is a question of law for resolution by the court." 652 So.2d at 447, quoting *Zambrano v. Devanesan*, 484 So.2d 603 (Fla.App. 4 Dist. 1986). The court then concluded that "on the merits" it agreed with Stembridge's argument that the content of the Bar Inquiry form was a "nonactionable statement of opinion." *Id.* at 446. As support for this proposition, the court quoted from section 566 of the Restatement (Second) of Torts, which provides:

> "A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion."

The *Stembridge* opinion relies primarily on two older Florida cases, *Eastern Air Lines, Inc. v. Gellert*, 438 So.2d 923 (Fla.App. 3 Dist. 1983) and *From v. Tallahassee Democrat, Inc.*, 400 So.2d 52 (Fla.App. 1 Dist 1981), in order to "summarize the applicable principles" of section 566. 652 So.2d at 445. Both *Eastern Air Lines* and *From*, applying what appeared at the time to be settled law, sought to delineate when a defamatory statement is nonactionable "pure opinion" or actionable "mixed opinion." The difference between the two, according to *From*, turns on whether the facts upon which the "opinion" is based are disclosed in the article or otherwise known to the reader. *Stembridge*, 652 So.2d at 446 (quoting *From*, 400 So.2d at 57). At the time the courts handed down *Eastern Air Lines* and *From*, this fact/opinion inquiry was thought to be essential and necessary under the First Amendment.

The analysis from *Eastern Air Lines* and *From*, however, is simply no longer good law. In fact, it never was.

These two decisions, it is important to note, were handed down years prior to *Milkovich*, and have been overruled by it. Both cases also make the mistake of citing *Gertz* as support for their position that this fact/opinion analysis is required under the First Amendment. *From* goes even further and quotes the very same dictum in *Gertz* which this Court held in *Milkovich* to be the cause of this confusion. The passage reads:

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. *From*, 400 So.2d at 56 (quoting *Gertz*, 94 S.Ct. at 3007).

Eastern Air Lines and *From* interpreted the above passage as requiring an inquiry into whether a defamatory statement is "fact" or "opinion." The Respondents in *Milkovich* also tried to convince this Court that the First Amendment mandates an inquiry into whether a defamatory statement is "opinion" or "fact." 110 S.Ct. at 2706. This Court flatly rejected such an inquiry. The Court acknowledged that many lower courts, in reliance on *Gertz*, had developed a number of factors over the years to be considered in deciding whether a statement is "fact" or "opinion." 110 S.Ct. at 2706. However, this Court overruled those prior cases because this interpretation of *Gertz* was a mistake. *Id. Milkovich* should have put an end to the perception – as it turns out, misperception – traceable to this dictum in *Gertz* that, in addition to all other Federal constitutional protections, there exists a wholesale defamation exemption for anything that might be labeled "opinion." Nonetheless the court of appeal in the

present case relied on overruled, pre-*Milkovich* "opinion" law and affirmed the grant of summary judgment in favor of Respondents. This was reversible error.

The court of appeal in the present case made no findings on the issues of falsity or actual malice. It instead relied on *Stembridge*, which held that "the determination whether a statement is fact or opinion is a question of law for resolution by the court," and decided the present case on that erroneous basis alone. 653 So.2d at 447 (quoting *Zambrano*, 484 So.2d at 606). The *Stembridge* court seemed to believe that a defamation suit could be – and under the First Amendment must be – disposed of with a simple finding that the alleged defamatory statements are "opinion" as opposed to "fact." This is not so. Just as with *Eastern Air Lines* and *From*, the *Zambrano* decision was handed down years prior to *Milkovich*. Courts at that time believed that this fact/opinion inquiry was constitutionally required. It is not. Thus this is another example of the *Stembridge* court quoting pre-*Milkovich* "opinion" law, believing it to be necessary, when in fact it has been rejected by this Court as too simplistic.

Once we do away with the notion that there exists an additional separate constitutional privilege for "opinion," the dispositive question becomes whether a reasonable factfinder could conclude that the statements printed by Respondents imply the assertions that (1) petitioner's financial management of the school was extremely poor, an auditor told the Board that the school's financial books were a shambles, and the Board fired Petitioner for this reason; and (2) Petitioner put public funds to personal

use, was caught, and was ultimately fired for it. *Milkovich*, 110 S.Ct. at 2707. It is clear that the statements printed by Respondents do imply both assertions. This is not the sort of "loose, figurative, or hyperbolic language" which would negate the impression that the newspaper was seriously maintaining that Petitioner both mismanaged the school's financial books and misused public money. *Id.* Nor does the general tenor of the articles negate this impression. *Id.*

II. THE STATEMENTS PRINTED BY RESPONDENTS ARE ASSERTIONS OF OBJECTIVE FACT WHICH ARE CAPABLE OF BEING PROVEN FALSE, AND THUS ACTIONABLE UNDER THIS COURT'S HOLDING IN *PHILADELPHIA NEWSPAPERS, INC. v. HEPPS*

Although there is no wholesale exemption from defamation liability for statements labeled "opinion," this Court did articulate a test in *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 106 S.Ct. 1558 (1986), for what types of statements may not give rise to defamation liability. Section 566 of the Restatement (Second) of Torts (which was adopted by the court in *Stembridge*) also sets out a test for when a statement is nonactionable. However, this Court's test and the Restatement's test are in conflict.

Section 566 seems to grant immunity to defamatory statements in the form of an opinion so long as the speaker discloses the facts upon which the opinion is based. However, according to *Milkovich*, "even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his

assessment of them is erroneous, the statement may still imply a false assertion of fact." 110 S.Ct. at 2706. Section 566 of the Restatement thus does not set out the same standard which this Court articulated in *Hepps*, and reaffirmed in *Milkovich*. "*Hepps* ensures that a statement of opinion relating to matters of public concern which does not contain a provably false factual connotation will receive full constitutional protection." *Milkovich*, 110 S.Ct. at 2706. The statements made by Respondents in this case do not qualify. Although the statements do relate to matters of public concern (since it is alleged that Petitioner misused public money), those statements are not entitled to protection under *Hepps* because they are provable as false.

Petitioner is specifically suing on two defamatory statements printed by Respondents, both of which are clearly provable as false: (1) "directors of the Academy for Community Education voted late Thursday to seek Dr. Dunn's resignation after an auditor told them that the school's financial books are a shambles"; and (2) "Marvin Dunn, a private school administrator who put public funds to personal use, paid the price with his job."

Both of the above statements are false in two respects. First, they both purport to list a reason for petitioner's termination. The reason for petitioner's termination is an assertion of objective fact which is capable of being proven either true or false. Second, the statements are false because (1) an auditor did *not* in fact tell the "directors" that the books were a "shambles" and (2) Petitioner did *not* in fact put public funds to personal use. These, too, are assertions of objective fact which are capable of being proven either true or false. Petitioner has

ample evidence in the record to raise a genuine issue of fact regarding the falsity of these statements on both levels. Such evidence includes, but is not limited to, the following:

1) Contradictory testimony by the key witness in the case, the auditor, Julio Buzzi, who testified in his deposition that he told the directors that he was unable to establish that public funds had been put to personal use. Several months later, after being contacted by attorneys for Respondents, Mr. Buzzi changed his testimony and provided an affidavit for Respondents in which he swore that he did tell the directors Petitioner had put public funds to personal use.

2) In his deposition Mr. Buzzi was asked if he included in his final report to the directors that Petitioner had put public funds to personal use. He responded, "Absolutely not."

3) Attorneys for Respondents contacted five of the directors who provided Respondents with false, after-the-fact affidavits in which they swore that the auditor told them that Petitioner put public funds to personal use and that Petitioner was fired for that reason. Yet, in his deposition the auditor testified that these specific individuals were among the directors whom he expressly told that he could not establish that Petitioner put public funds to personal use.

4) Mr. Buzzi's notes regarding the audit of the school in which he wrote that he told the directors that he was unable to document personal use of public funds and that the school's financial records were "in good order."

5) A videotape of the president of III appearing before the Dade County School Board at which time he told the School Board that Petitioner was not terminated for misuse of money. He said that Petitioner was terminated because he was starting a new board. Several months later the president provided an affidavit for Respondents in which he stated that Petitioner was terminated for misuse of funds.

6) The secretary of III who testified in her deposition that the directors never determined that Petitioner put public funds to personal use and that Petitioner was terminated for starting a new board. She later provided an affidavit for Respondents in which she stated that Petitioner was terminated for misuse of funds.

7) Another director, III's chief financial officer, was quoted in an article by Respondents in which the director stated that Petitioner was terminated for starting a new board. She made no reference to misuse of funds. Months later, after being contacted by attorneys for Respondents, this director provided an affidavit for Respondents in which she stated that Petitioner was terminated for misuse of public funds.

8) Petitioner's letter of termination makes no reference to personal use of public funds. The letter does mention starting a new board as the reason for the termination. Respondents had a copy of this document prior to publishing the offending editorial.

9) The organization passed its 1992 audit by Mr. Buzzi. This would not have been possible if public funds had been put to personal use. Respondents knew that the

organization had passed its audit when they printed the offending editorial.

The article and editorial did list several "facts" upon which Respondents supposedly based these "opinions." However, "even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact." *Milkovich*, 110 S.Ct. at 2706. Many of the "facts" upon which Respondents purport to have relied in printing these statements are at best incomplete, and at worse false. Petitioner has ample evidence in the record to raise a genuine issue of fact regarding whether these "facts" are either incomplete or false, and whether Respondents knew or should have known that these "facts" were incomplete or false. This evidence includes, but is not limited to, the following:

1) The statement in the article that Russel Wheatley was "furious" about the purchase of tickets to a reception is blatantly false. Mr. Wheatley testified that he was not furious, that he told the reporter that he was not furious and that Petitioner had done nothing wrong in the purchase of the tickets. He said the reporter "baited" him and showed an undue interest in Petitioner's sex life.

2) Respondents reported that Petitioner put public funds to personal use by financing a "long weekend" in California in 1992. But during his deposition Mr. Buzzi testified that this was not an example of public funds put to personal use by anyone. The chief auditor for the school system testified that he did not find that Petitioner

put public funds to personal use on this trip. Mr. Wheatley, who supervises the school for the public school system, also testified that public funds were not misused during this trip.

3) Respondents reported that Petitioner put public funds to personal use by placing two tires on his personal van to take students and staff members on an approved trip to Tennessee. Respondents did not report that the directors pre-approved the use of petitioner's van for official school business including transporting students and staff.

4) Respondents asserted that Petitioner put public funds to personal use by paying a former political aide to teach his classes at the university. Respondents did not report that the directors approved the employment of this individual who covered classes for Petitioner twice in three years while Petitioner was traveling on official III related business. Nor did Respondents report that this person was academically qualified to substitute for Petitioner.

5) Respondents claimed that Petitioner put public funds to personal use by making a political campaign contribution of fifty dollars. The auditor noted that this is not allowed under IRS rules. Petitioner voluntarily advised the auditor that actually about three hundred dollars were involved. He then provided documentation that showed that the funds involved were private, not public funds, and that the organization had been fully reimbursed.

Petitioner concedes that he is a public figure and thus required to demonstrate actual malice. *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710 (1964). Petitioner has

ample evidence in the record to raise a genuine issue of fact regarding whether Respondents knew or should have known that the defamatory statements were false when printed. Evidence of such malice includes, but is not limited to, the following:

1) In explaining the basis for his defamatory article, the reporter lied to his superiors telling them that Petitioner had illegally spent thousands of dollars on a personal trip to Tennessee in 1992 with the school's assistant principal and used only a scrap of paper to reimburse himself. In fact, this was a school trip approved by the directors and the School Board, and involved dozens of students and staff members. The reporter knew this and had been given all of the proper documentation relating to the trip. He intentionally withheld that information from his superiors.

2) Respondents printed an article, not subject to this lawsuit, only days preceding the offending editorial, in which a director gave the only articulated reason for the dismissal. She stated that Petitioner was terminated because he was starting a new board. The editorial writer testified that she read this article and relied upon it in preparing her editorial, however she chose not to state that this was the reason for the termination. The executive editor testified that he also read the article and approved the editorial as printed because the public would have been more interested in the firing for personal use of public funds.

3) The reporter lied to his superiors in writing, telling them that the chief auditor for the school system "was appalled" at the condition of the school's financial

records. The auditor testified in deposition that he never expressed an opinion to the reporter regarding the condition of the school's records and that his office did not find that public funds had been put to personal use.

4) Prior to writing the editorial, the editorial writer declined to accept relevant documents from Petitioner which would have given her pause to write that Petitioner was fired for putting public funds to personal use.

5) Respondents disregarded a statement on its own pages by III's chief financial officer who said that Petitioner was terminated for starting a new board.

6) Respondents were able to obtain an affidavit from the Chairperson of the Dade County School Board during the year in question who swore that *if* the facts stated in the Herald article were true, it would be of concern to her. Respondents however, have consistently misrepresented her statement by omitting the phrase "if the facts are true."

After over two years of discovery, Respondents have no documented evidence of personal use of public funds by Petitioner.

The proper inquiry at the appellate level should have been whether a reasonable jury could find from the above evidence both falsity and actual malice. "The question whether evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law." *Milkovich*, 110 S.Ct at 2705 (quoting *Harte-Hanks Commissions, Inc. v. Connaughton*, 491 U.S. 657, 685, 109 S.Ct. 2678, 2694 (1989). The lower court, however, believed that the question of law to be decided was

whether the statements were "fact" or "opinion." *Stembridge*, 652 So.2d, at 447. It thus never made any findings on the issues of falsity or actual malice. However, this Court has held that such fact/opinion considerations are unnecessary under the First Amendment. "We are not persuaded that . . . an additional separate constitutional privilege for 'opinion' is required to ensure the freedom of expression guaranteed by the First Amendment." *Milkovich*, 110 S.Ct. at 2707.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Submitted Pro Se

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

IN THE DISTRICT COURT
OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1997

MARVIN DUNN, Appellant, vs. THE MIAMI HERALD PUBLISHING CO., a Division of Knight-Ridder, Inc., a Florida corporation; and TOM DUBOCQ, Appellees.	** ** ** ** ** ** ** ** ** ** ** **	CASE NO. 96-454 LOWER TRIBUNAL NO. 94-1156

Opinion filed March 26, 1997.

An Appeal from the Circuit Court for Dade County, Murray Goldman, Judge.

Bienstock & Clark, and Terry S. Bienstock, and Kimberly A. Levine, for appellant.

Jerold I. Budney; Holland & Knight, and Sanford L. Bohrer, and Judith M. Mercier, for appellees.

Before LEVY, GERSTEN, and GREEN, JJ.

PER CURIAM.

Affirmed. *See Stembridge v. Mintz*, 652 So. 2d 444 (Fla. 3d DCA 1995).

IN THE CIRCUIT COURT FOR THE
11TH JUDICIAL CIRCUIT, IN AND
FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO.: 94-1156 CA (30)

MARVIN DUNN,

Plaintiff,

vs.

MIAMI HERALD PUBLISHING COMPANY, a Division of Knight-Ridder, Inc., a Florida corporation; and TOM DUBOCQ,

Defendants.

_____/

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(Filed Jan. 30, 1996)

This cause came before the Court on Defendants' Motion For Summary Judgment. The Court has reviewed the entire file, including everything filed by the parties in connection with the Motion, and heard argument of counsel. The Court has viewed the evidence in the manner most favorable to Plaintiff. The Court has determined (1) there is no genuine issue of material fact, and (2) Defendants are entitled to judgment as a matter of law for the reasons set forth below.

1. This is an action for defamation. Plaintiff Marvin Dunn ("Dunn") bases his suit on one statement made in a July 10, 1993 **Miami Herald** article (the "Atricle") and one

statement made in a July 17, 1993 **Miami Herald** editorial (the "Editorial"), both relating to Dunn's loss of his position as Executive Director of a school known as the Academy for Community Education (the "Academy").

2. Plaintiff concedes he is a "public figure" under the law governing this action.

3. Although a defamation cause of action is a common law tort, under the First Amendment, special protections exist for the press where a public figure is the plaintiff. Thus, to prevail on either statement, the First Amendment to the United States Constitution requires that Dunn prove it is a false and defamatory statement of fact about him and that Defendants published such statement either with knowledge of its falsity or with "reckless disregard" of is falsity. *Masson v. New Yorker Magazine,* ___ U.S. ___, 11 S.Ct. 2419 (1991), *Lampkin-Asam v. Miami Daily News, Inc.,* 408 So.2d 666 (Fla. 3d DCA 1982), *rev. denied,* 417 So.2d 329, *cert. denied,* 459 U.S. 806 (1982). The U.S. Supreme Court has defined "reckless disregard" as "a high degree of awareness of probable falsity" or "serious doubts as to the truth" of what was about to be published. *Masson v. New Yorker Magazine, supra.* A plaintiff must prove such knowledge or recklessness with "clear and convincing evidence." *Lampkin-Asam v. Miami Daily News, Inc., supra, Bose Corporation v. Consumers Union,* 446 U.S. 485 (1984). Under the First Amendment, this Court must assure itself from an independent review of the record that "the evidence is sufficient to cross the constitutional threshold that bars the entry of any judgment that is not supported by clear and convincing proof" of a knowing or reckless publication of a falsehood. *Bose Corporation v. Consumers Union, supra,* 446

U.S. at 511. Finally, Florida's appellate courts have indicated summary judgment is "especially appropriate in libel cases where the facts are not essentially in dispute because of the chilling effect of libel suits on First Amendment freedoms." *Karp v. Miami Herald Publishing Co.*, 359 So.2d 580, 581 (Fla. 3d DCA 1978). See also, *Menendez v. Key West Newspaper Corp.*, 293 So.2d 751, 752 (Fla. 3d DCA 1974) ("summary judgments should be more liberally granted" in public figure libel suits); *Della-Donna v. Gore Newspapers Co.*, 510 So.2d 984 (Fla. 4th DCA 1987) ("summary judgments should be liberally granted in libel cases" "where there is a lack of clear and convincing evidence" of knowing falsity or a high degree of awareness of probable falsity); *Cronley v. Pensacola News-Journal*, 561 So.2d 402, 405 (Fla. 1st DCA 1990) ("summary judgments are to be liberally granted"). Even if it were not the case that summary judgments are to be liberally granted, the Court has determined summary judgment should be entered for the same reasons it should be entered in any lawsuit: there is no genuine issue of material fact and Defendants are entitled to judgment as a matter of law.

4. The record indicates without issue that both statements sued upon are true statements of fact, which means Defendants are entitled to summary judgment. A cause of action for defamation cannot be sustained if the statements giving rise to the claim are true. See, e.g., *Appestein v. Knight Newspapers, Inc.*, 337 So.2d 1005 (Fla. 3d DCA 1976) and *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986). Defendants are also entitled to summary judgment even if a false statement of fact had been published, because the record indicates, assuming the

statements at issue to be false, and viewing the evidence most favorably to Dunn, that neither statement was made with knowledge or reckless disregard of such falsity, and Dunn cannot show with convincing clarity such knowing or reckless behavior. (See *Slomowitz v. Walker,* 429 So.2d 797, 800 (Fla. 4th DCA 1983), defining clear and convincing to be evidence "of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.") For example, the statement in the Article reports that the Academy's board voted to seek Plaintiff's resignation from his position at the Academy after an auditor reported to the board that the books of the Academy were in a shambles. Five board members testified in this case. All five said the statement accurately reports what they did and what the auditor communicated to them. In his testimony, the auditor said the statement accurately reports what he said. It is the same with the statement in the Editorial. The statement in the Editorial indicates Dunn used public funds for personal use and lost his job as a result. Again, the five board members testified the statement was accurate, and with regard to the assertion of personal use of public funds, the auditor's affidavit, quoting from and referring to findings in his audit reports, points out several instances of personal use and states the auditor told board members it appeared to him Dunn had made personal use of public funds. Finally, when asked by the Miami Herald reporter writing the Article for her reaction to some of the instances identified by the auditor, then Dade County School Board Chair Janet McAliley indicated if what was being told was true, it would be "of concern to me. Public

dollars shouldn't be spent on personal expenses." Ms. McAliley provided an affidavit supporting Defendants. The Court has considered all the evidence submitted on behalf of Dunn and Found it is insufficient to enable him to prove publication of a knowing or reckless falsehood with convincing clarity.

5. Alternatively, the statement in the Editorial is a statement of opinion or fair comment, not a statement of fact. The Editorial recites a series of instances of personal use of public funds by Dunn, including instances identified by the auditor (Dunn has not sued on those statements of fact) as the basis for the statement sued upon. The statement at issue appear to be a conclusion drawn by the writer based on the facts set forth in the Editorial. An allegedly defamatory statement in the form of an opinion may be "actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion." *Stembridge v. Mintz*, 652 So.2d 444 (Fla. 3d DCA 1995). *Scandinavian World Cruises (Bahamas) Ltd. v. Ergle*, 525 So.2d 1012 (Fla. 4th DCA), *rev. denied*, 536 So.2d 244 (Fla. 1988).

6. Defendants' Motion For Summary Judgment is therefore GRANTED. The Court has entered a Final Judgment this day in Defendants' favor.

ORDERED at Miami, Florida, this 30 day of January, 1996.

/s/ Murray Goldman
CIRCUIT COURT JUDGE

Copies:
Sanford L. Bohrer
Ira Hershkowitz

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA.

GENERAL JURISDICTION DIVISION

CASE NO. 94-1156 CA 03

MARVIN DUNN,

Plaintiff,

v.

MIAMI HERALD PUBLISHING COMPANY, etc., et al.,

Defendants.
_____/

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

THIS CAUSE came on to be heard on June 6, 1995, on Defendants' Motion for Summary Judgment, and the Court having heard argument, having examined all of the memoranda supplied and finding that genuine issues of fact exist as to all of the issues made by the Motion for Summary Judgment and as argued in the respective memoranda, including the issues of "reckless disregard of falsity," and being otherwise duly advised in the premises, it is hereby

ORDERED AND ADJUDGED that Defendants' Motions for Summary Judgment is DENIED.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida, this 31 day of August, 1995.

/s/ Stuart M. Simons
STUART M. SIMONS,
CIRCUIT JUDGE

True copies furnished to:

Sanford L. Bohrer, Esquire
Ira I. Herskowitz, Esquire

Article: The Miami Herald, July 10, 1993

"Principal's resignation sought:
Academy misuse of funds alleged"
By Tom Dubocq

Marvin Dunn, the prominent civic activist and university professor, is being pressured to resign from his school-principal job amid allegations that he mismanaged tax money intended to help troubled students.

Directors of the Academy for Community Education voted late Thursday to seek Dunn's resignation after an auditor told them the school's financial books were a shambles. At the same Board meeting, Dunn reported that the Academy is going broke.

Accountants and schools [sic] directors are questioning several thousand dollars in expenditures. Among them: IRS-prohibited political contributions, payments for a substitute teacher to cover Dunn's university classes, and a hotel bill for a long weekend in San Francisco last summer. The registered guests: Dunn, the Academy's assistant principal and her daughter.

Dunn contended Friday that he's done nothing improper. He said he intends to resign from his $61,000-a-year academy post – but on his own terms, "once the air has been cleared."

He acknowledged some spending mistakes, but he contends the bulk of the allegations against him are unfounded and are a vendetta.

"I have not misspent any money," Dunn told The Herald. "Basically, this is a power struggle."

The Academy is a small, highly regarded program for potential high school dropouts that Dunn founded a dozen years ago. It receives most of its funding from the Dade School Board.

Now the school system is hesitant to renew its $ 660,000-a-year contract. The district wants all of the Academy's problems cleared up.

"I don't have a full picture," School Board Chairperson Janet McAliley said Thursday. "It is of concern to me. Public dollars shouldn't be spent on personal expenses."

If problems persist, McAliley said, the district may take over the program. That would be relatively simple because the academy is staffed with school system teachers, and is housed in the district's Merrick Educational Center in Coral Gables.

The academy is operated by a non profit company, the Institute for Innovative Interventions, which is run by a board of volunteers. Dunn is the executive director.

The problems erupted early this year, when the school's former business manager complained to the directors – and was promptly ordered on administrative leave by Dunn. Dunn said she had bucked the chain of command and made unfounded allegations.

The situation went downhill from there, said Warren Hoskins, the academy's chairman. "We went from a board in January that was giving Marvin everything to a board in July that is seeking his resignation," Hoskins said Friday. "I'm heartbroken the way this has come down to a lack of trust."

The academy's directors brought in two accountants to examine the books. They found, among other things, that financial records were in disarray, and mandatory IRS filings had not been filed. Lots of expenditures – including gifts, bonuses and loans to employees – were lacking supporting documentation, they said.

Reports of the accountants, and other school records show:

- Monthly $200 payments to Robert Loring, a former political aide of Dunn and Assistant Principal Andrea Loring's ex-husband. Robert Loring said he performs a variety of computer services for the school. He also covers Dunn's classes at Florida International University when Dunn is tied up.

The accountants also questioned why the academy's office staff was logging grades for Dunn's college students who work as unpaid interns.

Dunn, paid $44,000 a year by FIU, said Loring rarely taught his class. He said the academy benefited from the work of his college interns.

- A $346 bill from the Crown Sterling Suites in San Francisco for a three-day stay last August. Dunn and Assistant Principal Loring said they checked into the hotel after attending an academic conference. Dunn said he stayed in San Francisco to "network" with West Coast contacts to learn new fund-raising methods for a public housing project he's developing.

Loring said she never slept in the suite, just used the hotel's exercise room to wind down until her plane ride

to Miami. "After a five-day conference, I needed a workout," she said.

The academy paid their expenses on the trip, about $2,100 for meals, jet fares, car rental and a $50 parking ticket Loring got while in California. Loring paid her child's air fare, she said.

- About $400 in political campaign contributions. Under IRS rules, the tax-exempt school is prohibited from giving money to political candidates. Dunn said he didn't know it was illegal and will reimburse the school.

- $70 for two tickets to a party last year for Associate Superintendent Russell Wheatley, the academy's supervisor at district headquarters. The private affair was at the exclusive Villa Woodbine in Coconut Grove. Wheatley said he was furious that the academy paid. "I saw it as a school-related activity," said Loring, who bought the two tickets.

Dunn said that by resigning he isn't trying to escape the academy's financial difficulties, only its directors. He said he wants to start fresh – with a new nonprofit corporation and new bosses – and take over the academy's dropout prevention program and other public service projects.

"I cannot continue to work for this organization," Dunn wrote Thursday to School Board Chairwoman McAliley. "This school is the primary focus of my professional life and that of other staff members who are demoralized. We will and must leave."

Editorial: The Miami Herald, July 17, 1993

"A School Gets An Education"

When bad business is practiced in the name of good business, there is almost always a price to pay. When public money fuels such practices, the penalty must be all the more exacting.

Marvin Dunn, a private school administrator who put public funds to personal use, paid the price with his job. An educator who has earned the trust and respect of Dade's academic community, Mr. Dunn recently was fired as executive director of the Academy for Community Education when auditors had trouble reconciling its financial records. He had refused to resign.

The academy's board of directors had no other choice. When told that the school's accounts were in questionable shape, they took action swift and, it is hoped, remedial. Now their subsequent actions will be just as important. They aren't the first board members of a publicly funded nonprofit agency to be caught unaware by long-brewing fiscal or administrative problems.

The academy receives funding from the Dade County Schools. With some of those funds, Mr. Dunn was paying a former political aide to teach his classes at Florida International University. He financed a long weekend in San Francisco with the academy's assistant principal and her daughter *after* an academic conference ended. He bought tickets to a private dinner. He also contributed to political campaigns with money not legally available for that purpose. (He has since repaid those funds, he says.) Mr Dunn's errors, it appears, were ones of judgment, not of criminal intent.

Still, the school Board pays the academy $660,000 a year to help troubled, at-risk students – who may be victims of their own faulty judgment – get back on track. That mission and Mr. Dunn's actions were out of sync.

And what of the board members' mission? It is above all their responsibility *not* to be surprised by improprieties, certainly not to tolerate them, and to ensure that public funds are used frugally. For nonprofit and public agencies to emblazon in red letters, "What would an independent auditor say?" atop every expense form and every check, might not be going too far to drive the point home.

The school Board, belatedly, has taken corrective action. It recently instituted measures to mandate annual audits of the private agencies with which it contracts for educational services.

Now the academy's board members are searching for a new director. They may find it an opportunity for soul-searching as well. That's a form of regular preventive maintenance that all such boards, charged with doing public good with public funds, need to undertake before their good business starts to go bad.